

IN THE INCOME TAX APPELLATE TRIBUNAL, DELHI 'D' BENCH,
NEW DELHI

BEFORE SHRI B.P. JAIN, ACCOUNTANT MEMBER, AND
SHRI SUDHANSHU SRIVASTAVA, JUDICIAL MEMBER

ITA No. 4478 & 5426/DEL/2011
[Assessment Year: 2000-01]

The A.C.I.T
Central Circle -19
New Delhi

Vs.

M/s L.T. Overseas Ltd.
[Now known as L.T. Foods Ltd
Unit No 134, First Floor
Rectangle 1, Saket Dist. Centre
New Delhi -110017

PAN : AAACL 0259 K

ITA No. 4191/DEL/11
[Assessment Year: 2000-01]

M/s L.T. Overseas Ltd.
[Now known as L.T. Foods Ltd
Unit No 134, First Floor
Rectangle 1, Saket Dist. Centre
New Delhi -110017

Vs.

The C.I.T - VII
New Delhi

PAN : AAACL 0259 K

[Appellant]

[Respondent]

Date of Hearing : 24.01.2018
Date of Pronouncement : 26.02.2018

Assessee by : Shri Salil Kapoor, Adv
Shri Vineet Agarwal, CA
Shri Kislaya Parashar, Adv

Revenue by : Shri Amit Jain, Sr. DR

ORDER

PER B.P. JAIN, ACCOUNTANT MEMBER,

These appeals filed by the revenue and the assessee are directed against the common order dated 07.07.2011 passed by the CIT(A) VII, New Delhi for AY 2000-01 u/s 250(6) of the Income Tax Act, 1961 (hereinafter referred to as the Act for short). The appeal is also filed by revenue against the order of CIT(A) passed in respect of order u/s 271(1)(c) of the Income-tax Act, 1961 [hereinafter referred to as 'the Act' for short].

2. The assessee is in the business of manufacture and export of rice. During year under consideration, i.e. AY 2000-01, the assessee filed return of income on 30.11.2000 declaring an income of Rs. 19,35,390 /-. The case was selected for scrutiny and a notice u/s 143(2) was issued. Thereafter an assessment order was passed u/s 143(3) of the Act and the same is placed in the paper book at pages 76-77. Thereafter the CIT passed an order u/s 263 of the Act dated 28.02.2005 and the same is placed in the paper book at pages 78-85. The assessee had approached the ITAT against order u/s 263 and appeal was partly allowed vide order dated 21.04.2006. Meanwhile, the Assessing officer passed an assessment order

dated 29.03.2006 u/s 263/144 assessing total income at Rs 2,25,78,836/. The assessee preferred an appeal against the assessment order to CIT(A) VII ,New Delhi and also filed various documents and additional evidences under Rule 46-A of the I.T. Rules. The CIT(A) did not admit any additional evidence and dismissed the appeal of the assessee. The assessee filed an appeal in the ITAT .The ITAT vide its order dated 23.10.2009 (place in the paper book at pages 69-71) remitted the matter back to the CIT(A).The ITAT observed as under :-

“5. We have heard both the parties and gone through the material available on record .In this case the assessing officer had provided several opportunities to file evidence as per direction of the ld. Commissioner of Income-tax given in his order passed u/s 263 of the Act. The assessee filed application under Rule 46-A for admission of additional evidences, which has been rejected by the CIT (A). It is a fact that an appeal was preferred by the assessee before the ITAT against the order of the ld. CIT passed u/s 263 of the Act. It was the duty if the assessee to file necessary information called for by the assessing officer even through the appeal was pending before the Tribunal against order passed u/s 263 of the Act. However, keeping in view the principles of the natural justice the ld. CIT(A) ought to have adjudicated upon the issue on the basis of material filed before him, whether it was additional evidences or the evidence already available on record.

Therefore, we are of the considered opinion that the ld. CIT(A) should decide the issue on the basis of evidence filed by the assessee before him in support of his case .We accordingly set aside this issue to the file of the ld. CIT(A) with the directions to pass order after considering the material available on record including the evidences filed before him in the course of appellate proceedings .We order accordingly.”

3. Pursuant to the above directions of the ITAT, the case was refixed by the CIT(A) VII, New Delhi to adjudicate the case on merits after considering the evidences and materials filed by the assessee .The assessee appeared before the CIT(A) and filed its submissions alongwith various documentary evidences as already filed, on various additions and disallowances made by the A.O. The various submissions and evidences filed by the assessee before the CIT(A) are place in the paper book .The CIT(A) called for a remand report from the A.O. to comment upon the evidences ,documents and submissions filed by the assessee. The A.O. sent a remand report and after a detailed analysis the CIT(A) passed an order dated 07.07.2011 by which the appeal of the assessee was partly allowed . Against this order the assessee and the revenue have preferred appeals before us.

ITA NO 4478 /DEL/2011(appeal by Revenue in quantum)

4. The revenue has preferred this appeal before us on the following grounds :-

1. *On the facts and in the circumstances of the case, the CIT(A) has erred in law and on facts in deleting the disallowance of Rs.70,08,382/-made by the Assessing Officer on account of quality discount.*
2. *On the facts and in the circumstances of the case, the CIT(A) has erred in law and on facts in deleting the disallowance of Rs.70,08,382/-made by the Assessing Officer on account of quality discount.*
3. *On the facts and in the circumstances of the case, the CIT(A) has erred in law and on facts in deleting the disallowance of Rs.30,984/-made by the Assessing Officer on account of interest paid on interest-free loan to sister concern.*
4. *On the facts and in the circumstances of the case, the CIT(A) has erred in law and on facts in deleting the addition of Rs.6,85,264/- made by the Assessing Officer on account of shortage of stock despite the fact that the Assessing Officer, in his remand report had pointed out the discrepancy amounting to Rs.1,14,08,538/- in order the u/s 144/263 to the notice of the CIT(A) and had requested him to consider this issue for enhancement of income of the assessee.*
5. *On the facts and in the circumstances of the case, the CIT(A) has erred in law and on facts in holding that insurance claim amounting*

to Rs.10,27,396/-received by the assessee is to be included in the business income for the purpose of deduction u/s 80HHC of the Income tax Act,1961.

- 6. On the facts and in the circumstances of the case, the CIT(A) has erred in law and on facts in holding that profit amounting to Rs.13,799/-from sale of scrap is to be included in the business income for the purpose of deduction u/s 80HHC of the Income tax Act,1961.*
- 7. On the facts and in the circumstances of the case, the CIT(A) has erred in law and on facts in holding that other income, miscellaneous income and profit on sale of fixed assets amounting to Rs.2,54,622/-, Rs.2,03,054/- and Rs.1,48,954/- respectively is to be included in the business income for the purpose of deduction u/s 80HHC of the Income tax Act,1961.*
- 8. On the facts and in the circumstances of the case, the CIT(A) has erred in law and on facts in excluding the indirect cost of Rs.69,76,124/- on account of proportionate interest payment, taken by the Assessing Officer for the purpose of deduction u/s 80HHC of the Income tax Act,1961.*
- 9. On the facts and in the circumstances of the case, the CIT(A) has erred in law and on facts in holding that outstanding export receivable amounting to Rs.1,22,05,224/- is to be included in export turnover for the purpose of deduction u/s 80HHC of the Income tax Act,1961.*

10. *On the facts and in the circumstances of the case, the CIT(A) has erred in law and on facts in admitting additional evidence under Rule 46A despite the fact that assessee could not produce the original documents and the authenticity of the same remained unverified.*
11. *On the facts and in the circumstances of the case, the CIT(A) has erred in law and on facts in not accepting the request of the Assessing Officer for enhancement of income of the assessee on account of shortage of closing stock of Binola Bags amounting to Rs.59,70,000/-.*
12. *The order of the Id. CIT(A) is erroneous and is not tenable on facts and in law.*
13. *The appellant craves leave to add, alter or amend any/all of the grounds of appeal before or during the course of the hearing of the capital.*

5. In respect of ground No 1 the DR appearing on behalf of the revenue submitted that the order passed by the Id. CIT(A) VII is not valid and not maintainable in law. On the issue of quality discount of Rs. 70,08,382/- claimed by the assessee, the DR submitted that the assessee did not offer any justifiable explanation that why the assessee had to incur this expense and the DR also submitted that no such expense was claimed by the assessee in the previous assessment year. On the other hand Id.

Counsel appearing on behalf of the assessee submitted that the quality discount of Rs. 70,08,382/- was offered by the assessee to its customers abroad because there was claim of customers that there is difference in the quality of the goods supplied. He further submitted that the remittance was made through banking channels and the amount spent is for commercial expediency since the customer might even reject the shipment if the quality is not satisfactory .This discount was offered to maintain good relations with the customers and the first year of such expenditure should not make any impact if the assessee is fulfilling other conditions.

6. The DR also agued ground No 10 which is on the issue of admission of additional evidences and stated that CIT (A) has erred in admitting the same. The counsel submitted that provisions of Rule 46A do not get attracted in the facts of the present case since the ITAT in its earlier order directed the CIT(A) to consider the evidences and material placed before him and decide the matter on merits. The counsel pointed out that the CIT(A) gave an opportunity to the AO in accordance with principles of fair play and natural justice. Our attention was drawn to para 3 of the CIT(A) order which is reproduced as under :-

“3. In compliance with directions of Hon’ble ITAT, notice was issued under section 250 of the Act was issued. In response to the said notice, Shri Sanat Kapoor, Advocate furnished written submission and the case was discussed with him. During the appellate proceedings, the copies of the documents (which had already been furnished on behalf of the appellant before my predecessor-in-office in the first innings which culminated into the disposal of appeal by him vide his order dated 14.02.2008) were furnished again on behalf of the appellant. I am of the firm opinion and considered view that it was not necessary at all to give opportunity to the Assessing Officer in terms of Rule-46A(3) of the I.T. Rules, 1962 (in view of the directions of Hon’ble ITAT) for examining the documents which were furnished again on behalf of the appellant before the undersigned. However, in accordance with the principles of natural justice and fair play, the copies of the above-mentioned-documents were sent again to the A.O. on 16th March, 2010 in order to give opportunity’ to him and Submit his comments, if any. In its response, a report was submitted by A.O. i.e. ACIT, Central Circle-19, New Delhi (to whom the jurisdiction was subsequently transferred from DCIT’,Circle-4(l),New Delhi) on 01.04.2011 through Addl. CIT, Central Range-6, New Delhi. The relevant portion of the said report is reproduced below for ready references..”

7. The counsel for the assessee further submitted that at para 3.1 the CIT(A) has reproduced their rejoinder from which it is clear that the AO took one year to send a remand report and all paper books and submissions were filed before the AO. Also the CIT(A) called for a remand report in the first round of litigation also.

8. We have heard the rival contentions and perused the facts of the case. We deem it fit to decide the ground no. 10 raised by the Revenue first since it concerns the admissibility of additional evidences .After hearing the ld DR. and the ld. Counsel of the assessee we are inclined to agree with the ld Counsel of the assessee and uphold the view taken by the CIT(A) which is also reproduced above . After the order of ITAT in assessee own case in the first round of litigation the CIT(A) was under no obligation to call for a remand report as contemplated under Rule-46A since the ITAT gave a clear direction to the CIT(A) to decide the case on merit by considering the material placed before him by the assessee .However the CIT(A) in order to be fair to the A.O. still decided to grant an opportunity to the A.O. to give his views and comments on the evidences and material placed before him .We do not find any infirmity in the approach of the CIT(A) .The CIT(A) has followed the due procedure

and not violated natural justice. The remand report is duly acknowledged in the order of CIT(A) and now at this stage it is not permissible to the Revenue to challenge admissibility of additional evidence specially after the order of ITAT in assessee own case in the first round of litigation. Coming to the merits of the case, we are of the opinion that the A.O. was not justified in making disallowance of Rs. 70,08,382/- on account quality discount and the CIT(A) has rightly directed the deletion of the disallowance. This issue has been dealt by the CIT(A) at Para 4.1 of the order. It is observed that such quality discount has been claimed by the assessee in subsequent years and such quality discount has been allowed by the A.O. while completing assessments u/s 143(3) of the Act. It is further observed that when some foreign buyers objected to the quality of the goods supplied to them the assessee remitted back the discount to the foreign buyers through banking channels to avoid any rejection of shipment .So long the assessee fulfills other criteria as laid down under income tax laws it should be immaterial that whether this is the first year of the claim of deduction. In result Ground No 1 and 10 of the revenue appeal are dismissed.

9. Ground no 2 is on the issue of demurrage of Rs. 10,78,014/- claimed by the assessee. The DR submitted that the assessee did not substantiate its claim. The Counsel of the assessee argued that the demurrage of Rs. 10,78,014/- was rightly allowed by the CIT (A) since it is common for companies engaged in export business to incur such expenditure and such expenses are incurred in the normal course of carrying on the business .It was also submitted that demurrage has been allowed as expenditure to the assessee in its previous years and subsequent years. On the issue of claim of demurrage charges of Rs. 10,78,014/- we uphold the order of CIT(A) in which he has directed the deletion of the demurrage charges. It is not in dispute that the assessee is into export business. On perusal of Para 5.1 of the CIT(A) order it is seen that the demurrage charges has been allowed to the assessee in the preceding and subsequent years by the A.O. The A.O. has neither pointed out and defect nor the DR has been able to demonstrate that how the facts of this year are different from the previous and successive years of the assessee when the department has itself allowed the demurrage charges to the assessee. The DR has not been able to point out anything wrong with the finding of CIT(A). The ground No 2 raised by the revenue is dismissed.

10. In respect of ground No 3 the DR relied on the order of AO. The counsel submitted that the interest free advance was used for the purpose of the business of the company and hence the addition of Rs.30,984/- was rightly allowed by the CIT (A) considering the fact and circumstances of the case. In so far as the disallowance of Rs. 30,984/- is concerned it is seen that it is matter of record that advance was given by the assessee company long time back to its sister concern. There is no legal impediment in giving an interest free advance to a sister concern and this is a very old debit balance and nothing has been brought on record to show that disallowance was made in the past. Hence, we uphold the order of CIT(A) and dismiss this ground of the revenue.

11. Ground No 4 is on the issue of shortage of stocks of Rs. 6,85,264/- it is submitted by DR that the assessee has not been able to shown any evidence in support of shortage and in absence of same it is not possible to arrive at any conclusion that some pilferage may have been there. He further relied on the view of the AO and his ground. On the issue of the shortage of stock of Rs. 6,85,264/- the counsel of the assessee submitted that the shortage of stock has been certified by the auditors and the loss is on account of handling, storage, infection by rodents and

transportation which is very common in case of food items such as rice in which the assessee is dealing . He further pointed that the shortage of stock in comparison to the sale of the company is 0.04% which is negligible .He further argued that the A.O. in the remand report has pointed that the addition on shortage of stock should have been Rs. 1,14,08,538/- is totally illegal and factually incorrect as the correct calculations have been filed before the CIT(A) in submissions and the same have been accepted.

12. We have heard rival submissions on the issue of disallowance of Rs 6,85,264/- on account of shortage of stock, we shall first deal with the request for enhancement made by the A.O. to the CIT(A) in his remand report. We are of the considered view that whether to make enhancement or not is the sole discretion of CIT(A). The matter has been remanded back by the ITAT to CIT(A) to decide the issues on the basis of material filed by the assessee and as such the scope of remand was limited to the additions already made which were subject matter of appeal to ITAT. It is seen from Para 7.2 of the CIT(A) order that shortage has been claimed only for those items which are lying for a very long time and which in the opinion of the company are not fit for human

consumptions and hence the same are eliminated from the stock of the company. This shortage of stock is also resulting on account of loss in-handling , transportation, storage, infection etc which is quite acceptable in food products such as rice in which the assessee is dealing. Also this shortage of stock is about 0.04% of the sale made by the company and this shortage is accepted by the auditors also .This shortage of stock has been allowed to the assessee by the Revenue in its previous and succeeding years. The CIT(A) has given detailed reasons to allow this ground. We do not find any infirmity in the findings of CIT(A), hence ground No 4 of the revenue is dismissed.

13. Ground No 5 is in respect of deduction U/s 80HHC on insurance claim received. On the issue of insurance claim of Rs. 10,27,396/- included in the business income for deduction u/s 80HHC the ld. DR submitted that it should not be considered for deduction since it is not earned from the export of goods. On the other hand the counsel of the assessee submitted that the money received from insurance company of Rs. 10,27,396/- was rightly included in the business income for deduction u/s 80HHC of the Act since the insurance claim related to stock in trade which was meant for export and it does not constitute an independent

income of any different nature . The counsel has placed reliance on the decision of CIT vs Pfizer ltd. 330 ITR 62 (BOM) to support his submission.

14. We have heard both parties. The CIT(A) has discussed the issues covered u/s 80HHC at para 8.1 of the order. The insurance claim of Rs. 10,27,396/- received by the assessee is to be included in the business income of the assessee for the purpose of deduction u/s 80HHC. We are of the view that the CIT(A) has taken the correct view that this income should be included in the business income for calculating deduction u/s 80HHC of the Act. It is observed that the assessee takes insurance to cover the risk of loss in shipments of the goods exported by the assessee. The insurance claim received by the insurance company is on account of loss on account of export consignments. Therefore the insurance claim is related to the stock-in-trade on sale of such goods constitute business profits which would be entitled to deduction u/s 80HHC of the Act. The assessee has relied upon the decision of CIT vs Pfizer ltd 330 ITR 63(BOM) and the ld. DR was not able to point out any decision in favour of the Revenue on this issue. Hence we uphold the view taken by the CIT(A) as such and ground No 5 raised by the revenue is dismissed.

15. Ground No 6 and 7 are in respect deduction U/s 80 HHC on profit on sale of scrap, misc income, other income and income from sale of fixed assets. The DR submitted that this income has nothing to do with exports. The counsel relied on the finding of CIT (A). After hearing both the parties we are of the view that all the details are not before us as to how this income relates to export of goods. Hence the ground No 6 and 7 raised by the revenue are allowed.

16. Ground no 8 is on the issue of exclusion of interest from indirect cost and ground No 9 is on the issue of export receivables. The DR submitted that CIT(A) is not right in holding that interest allocation excluded and outstanding export receivable is to be included in export turnover for the purpose of calculating deduction u/s 80HHC of the Act. The counsel submitted that the interest of Rs. 34,10,738/- has been allocated by the Assessee as indirect cost relating export of goods. The assessee has taken Rs. 34,10,738/- as indirect cost which is connected with the export business hence not eligible for deduction u/s 80HHC and therefore the CIT(A) has rightly deleted the interest cost of Rs. 69,76,124/- . The counsel submitted that the assessee has been very fair and logical in making these calculations. The counsel argued that the

CIT(A) was right in holding that outstanding export receivable amounting to Rs. 1,22,05,224/- is to be included in the export turnover for the purpose of computing deduction u/s 80HHC of the Act. The entire receivables were received within the stipulated time of 6 months from the end of the financial year. This amount was shown as due for a period exceeding 6 months since the audit report was prepared as on 31.3.2000 meaning thereby that this amount pertains to exports made in September 1999.

17. We have heard both sides. The issue raised by the Revenue is attribution of interest cost of Rs. 69,76,124/- It is noted that in the present case the assessee has itself take an amount of Rs. 34,10,738/- as an indirect interest cost which is attributable to the exports activity of the assessee and the other loans are taken to meet the other requirements of the assessee. We do not wish to interfere with the findings of the CIT(A) and uphold order of the CIT(A) in which the CIT(A) has directed the A.O. to delete the interest cost of Rs. 69,76,124/- while arriving at the figure of profit in trading goods for purpose of deduction U/s 80HHC. We find that the assessee has been correct in making this suo moto disallowance of Rs 34,10,738/- while computing the deduction u/s

80HHC. The scheme of section 80HHC is clear that what is allowed for deduction u/s 80HHC are the business profits. In case an assessee is having export business and domestic business then the profits of each business will be apportioned and then the assessee will be able to claim deduction u/s 80HHC. The ld. DR has not been able to controvert these findings of the CIT (A). Lastly regarding the outstanding export receivables of Rs. 1, 22, 05,224/- which the A.O. did not include in the export turnover. It is observed that the assessee has shown this amount under the head current assets loans and advances in its financial statements. This was shown under the head current assets loans and advances since the assessee had made the export sales but however the payments were not received by 31.03.2000 when the books of accounts were audited. However the payments were received in six months thereafter and hence there cannot be any doubt that the same is to be included in the export turnover as required u/s 80HHC (2)(a). Hence ground No 8 and 9 raised by the revenue are dismissed.

18. Ground No 11 is in respect of request for enhancement to CIT(A) to enhance the income of the assessee by Rs. 59,70,000/- on account of shortage of binola bags. The DR submitted that CIT(A) should have

enhance income on account to binola bags. The counsel submitted that this issue was never subject matter of appeal before ITAT hence CIT (A) has rightly refused to entertain the fresh issue raised by AO in remand proceedings. After hearing both the parties we are of the view that the CIT(A) is right in holding that what was not the issue before ITAT cannot be raised by the AO in remand proceedings. The ground no 11 is dismissed.

19. Ground No 12 and 13 are general in nature and not argued by DR hence these are dismissed.

20. In the result the appeal of the Revenue is partly allowed.

ITA No. 4191/DEL/2011 (Assessee appeal on quantum)

21. This appeal has been filed by the assessee .The assesses has raised the following grounds of appeal before us.

- 1) *That the AO & CIT(A) has, in view of the facts and circumstances of the case, erred in law and on facts in not allowing the deduction of Rs. 26,97,167/- being the amount written off on account of DEPB receivables of Rs. 18,40,176/- & SIL receivable of Rs. 8,56,990/-.*

Both the above said authorities have failed to appreciate that the said amount has already been included in the income of earlier years and write-off in this year is an allowable deduction.

- 2) That the CIT(A) has, in view of the facts & circumstances of the case, erred in law & on facts in upholding the treatment of interest on FDRs kept as margin money of Rs. 5,32,433/- as income from other sources as against business income declared by the assessee.*
- 3) That the CIT(A) has, erred in law and on facts, in not allowing netting off interest earned on FDRs kept as margin money for the purpose of allowing deduction U/s 80HHC.*
- 4) That the CIT(A) has, in view of the facts & circumstances of the case, erred on facts in treating holding interest on FDR's kept as margin money Rs. 5,82,433/- as income from other sources against actual interest of Rs. 5,32,433/-.*
- 5) That the CIT(A) has, in view of the facts & circumstances of the case, erred in law & on facts, in not allowing deduction U/s 80HHC on Special Import License (SIL) income of Rs. 4,25,000 & on DEPB license to extent of Rs. 1,14,00,640/-.*
- 6) That the CIT (A) has failed to appreciate that the said export incentives are directly linked to the exports & deduction U/s 80HHC is allowable on said income, which is assessable as business income.*
- 7) That the CIT(A) has, in view of the facts & circumstances of the case, erred in law & on facts, in reducing the deduction U/s 80HHC*

for working out the eligible amount for purpose of allowing deduction U/s 80IA. The CIT (A) has erred in not allowing deduction U/s 80HHC & 80IA, independently of each other.

- 8) *That interest U/s 234 B & 234C has been wrongly & illegally charged. In any case appellant could not anticipate said additions & disallowances and could not have included it in estimated income for purpose of advance tax.*
- 9) *That the evidence and explanation given by the appellant and the material available on record have not been properly considered and judiciously interpreted.*
- 10) *That the additions have been made on basis of mere surmises and conjectures and contrary to facts and evidence on record and cannot be justified by any material on record.*
- 11) *That in any case the additions are unjust, unlawful and highly excessive and the income has been wrongly assessed.*
- 12) *That Appellant craves leave to add, amend, alter and/or delete any of the above grounds of appeal at or before the time of hearing.*

22. Ground no 1 is in respect of claim of deduction write off of DEPB receivable and SIL receivable. The counsel submitted that these amounts have been included in the income in earlier years and the write off of the same is allowable as deduction. The DR has relied on the order of lower

authorities. The CIT(A) has rejected this ground as according to him there no mention in the assessment order of this issue. We restore this issue back to AO to decide afresh. The assessee is directed to produce details of this claim before the AO. The AO shall examine the details and decide as per law. This ground is allowed for statistical purpose.

23. Ground No 2, 3 and 4 are in respect of interest income to be treated as Business income or Income from other sources and claim of deduction U/s 80HHC in respect of said interest. The ld. counsel of the assessee has submitted that the CIT (A) erred in upholding the treatment of interest income of Rs. 5,32,433/- as income from other sources where as it should be treated under the head of Profits and Gains from business and profession . The counsel further submitted that the assessee had pledged its FDR's with the bank as margin money to avail credit facilities from the bank and hence this money received is directly attributable to the export business of the assessee. The counsel further relied upon the decision of Riviera home furnishing vs. CIT 237 Taxmann 520 (Delhi) in which a similar issue was decided but in the context of section 10B of the act in which it was held that FDR's which are under lien with the bank for facilitating credit the interest of the said FDR's must be eligible for

deduction under the Act. The counsel has taken us through the relevant Para of the decision. The counsel has further pointed out that the language used in section 10B sub-section (1) and Section 80HHC Sub-section (1) is the same. On the other hand, the ld. DR. appearing for the Revenue submitted that the issue of interest income of Rs. 5,32,433/- being treated as income from other sources should be upheld as it is a settled principle of law that income from FDR's are treated as income from other sources.

24. We have heard the rival contentions of the parties. In so far as issue of treating interest income as income from other sources or part of business profit we are inclined to agree with the counsel of the assessee that there is a direct and proximate nexus between the interest incomes on FDR's kept as margin money to avail credit facilities for the purpose of making export sales and hence the interest income should qualify as part of business profits of the assessee. The ld. DR, while opposing the submissions of the assessee, has sought to rely upon the decision CIT vs. Jyoti apparels (208 166 Taxmann 343 Delhi) and CIT vs. Mereena creations (2010 189 Taxmann 71). We find that this issue has been answered on favour of assessee by subsequent decision of Delhi High

court in the case of Riviera Home furnishing vs. CIT (2016 237 Taxmann 520), CIT vs. Universal precision screws (ITA No 392/2015) and CIT vs. Hritnik exports Pvt. ltd (ITA No 219 and 239/2014). Also it is a settled principle of law that where there are conflicting decisions on the same issue the decision in favour of assessee should be followed. These grounds raised by the assessee are allowed.

25. Ground No 5 and 6 are raised by the assessee on the issue of whether DEPB License of Rs. 1,14,00,640/- and SIL of Rs. 4, 25,000/- are entitled for benefit of Sec 80HHC. The ld. Counsel of the assessee has pointed out that this issue has now been settled in favour of the assessee by the Supreme Court in the case of Topman Exports vs. CIT 342 ITR 49 (Supreme Court). This decision supreme court has reversed the findings of the Bombay High Court in the case of CIT vs. Kalpataru Colours and chemicals 328 ITR 421(BOM) in which view was taken against the tax payers. Further the counsel for the assessee has submitted that the AO noted that such benefit should not be granted to the assessee in view of the amendment in Sec 80HHC where a distinction is made between assessee with turnover less than 10 crores and more than 10 crores. The counsel submitted that this issue has also been settled in favor of the assessee by the decisions

of Supreme Court in case of CIT v Avani Exports 232 Taxman 357 (2015) and UOI v Paliwal Overseas Ltd 244 Taxman 195 (SC).

26. On the issue of DEPB be considered for the purpose of deduction u/s 80HHC the ld. DR relied upon Liberty India vs. CIT 317 ITR 218 (Supreme Court).

27. Coming to the issue of DEPB and special import license be considered for deduction u/s 80HHC we find that this issue is squarely covered by the case of Topman exports vs. CIT, CIT vs. Avani Exports and UOI v Paliwal Overseas Ltd (supra). The case laws of Liberty India vs. CIT (Supra) and Opera Clothing vs. ITO (Supreme court) are not applicable to the facts of the present case since in those cases the issue was that whether duty drawback receipt/DEBP benefits cannot be considered as deductions in respect of profits and gains from industrial undertaking for the purpose of 80IB of the Act. The issue involved in the present appeal is whether DEPB benefits can be taken in section 80HHC of the Act computation. It should be clarified that section 80HHC and Section 80IB are completely different sections from each other in every aspect and the

judgment delivered in which section 80IB is interpreted cannot be applied to issues of section 80HHC of the Act.

28. Grounds No 7 are raised on the issue of whether deduction u/s 80HHC of the Act should be reduced for working out the eligible amount of deduction for the purpose of working out the deduction u/s 80IA of the Act, the counsel of the assessee submitted that after various divergent views taken by various courts this issue has been admitted by the Supreme Court and further there has been a diversions of opinion between two judges of the supreme court who have delivered different judgments on this issue in the case of ACIT vs. Micro Labs ltd. 380 ITR 01 (Supreme court). Now this issue has been referred to a larger bench of the Supreme Court as a final decision on this issue has not been delivered yet. So the counsel submitted that in the interest of justice directions may be given to the A.O. to wait for the final decision of the Supreme Court on this issue and relief may accordingly be granted to the assessee on this issue. The ld DR did not object it.

29. We hold that the issue has still not been settled and the case of ACIT vs. Micro Labs ltd. has been referred to the larger bench of supreme court after there were divergent judgment from the supreme court. Hence we restore this issue back to the file of the A.O. The A.O. is directed to re-examine this issue after the final judgment from the Supreme Court is delivered.

30. Grounds No 8 relates to the issue of charging of interest. Charging of interest is consequential in nature and does not require any specific adjudication.

31. Grounds No 9, 10, 11, 12 are general in nature and hence the same are dismissed.

32. In the result the appeal of the assessee is partly allowed.

ITA No. 5426/D/11 (Penalty appeal of Revenue)

33. This appeal has been filed by the Revenue against the order of CIT (A), VII New Delhi ,Dated 06.09.2011 by which the penalty levied u/s 271(1)(c)Of Rs 81,00,000/- was levied by the ACIT circle 4(1),New Delhi.

34. The revenue has raised the following grounds of appeal before us:

1. *On the facts and in the circumstances of the case, the CIT(A) has erred in law and on facts in cancelling the penalty of Rs.81,00,000/- imposed by the Assessing Officer u/s 271(1)(c) of the Income-tax Act,1961.*
2. *On the facts and in the circumstances of the case, the CIT(A) has erred in law and on the facts in holding that making a claim which is not sustainable in law will not by itself amount to furnishing of inaccurate particulars of income.*
3. *The order of CIT (A) is erroneous and is not tenable on facts and in law.*
4. *The appellant craved leave to add, alter or amend any/all of the grounds of appeal before or during the course of the hearing of the appeal.*

35. It is seen from the order of CIT (A) in quantum proceedings that only three issues were decided against the assessee. Interest of Rs. 5,32,433/- assessed as income from other sources against business income

declared by the assessee, not allowing deduction u/s 80HHC on special import license of Rs. 4,25,000/- and DEPB license of Rs. 1,14,00,640/- and reducing the deduction u/s 80HHC for working out eligible amount of deduction u/s 80IA. It is seen that the penalty on these issues was deleted by the CIT(A) on the ground that the penalty proceedings are different from the assessment proceedings and the observations in the assessment proceedings are not conclusive. The CIT (A) further held that the assessee has not furnished inaccurate particulars of income in its return and the differences have arisen only because of difference in opinion and assessee submitted bonafide explanations. It was further held that just because certain claims were not allowed by the Revenue, it cannot be said that assessee has furnished inaccurate particulars of income. However now in quantum proceedings we have already dismissed the appeal of the Revenue and partly allowed the appeal of the assessee. The only issue that has not been allowed in favour of the assessee is the issue of calculation of deduction u/s 80IA without reducing the amount already allowed as deduction u/s 80HHC. We have already remitted the matter back to the file of the A.O. with a direction that the issue may be decided in accordance with the final decision of the Supreme Court in the case of ACIT vs. Micro Labs Ltd. However, we are of the opinion that no

penalty u/s 271(1)(c) should be levied on the assessee for this issue since neither it is a case on concealment of income nor that of furnishing of inaccurate particulars of income. This issue has been adjudicated by various courts in different manner. The special bench of ITAT in the case of ACIT vs. Hindustan Mint and agro products ltd. 119 ITD 107 decided the issue against the assessee. This issue went up to the supreme court and the Hon'ble has delivered divergent judgment on this issue and now the matter have been referred to the larger bench of supreme court .If divergent views can come from the apex court it clearly shows that the issue is highly debatable and in such a case the assessee should not be made to suffer the raggars of the penalty.

36. All the issues relating to 80HHC deduction are debatable and complex issues hence there cannot be penalty u/s 271(1)(c) of the Act on these issues. Also it is not the case of the revenue that there was any concealment of income or furnishing of inaccurate particulars of income. Accordingly, the grounds raised by the Revenue are dismissed.

37. In the result, the appeal of the Revenue is dismissed.

37. To sum up, in the result the appeal of the Revenue in ITA NO 4478 /DEL/2011_is partly allowed, ITA NO 5426 /DEL/2011 is dismissed and the appeal of the assessee in ITA No 4191/DEL/2011 is partly allowed.

The order is pronounced in the open court on 26.02.2018.

Sd/-

**[SUDHANSHU SRIVASTAVA]
JUDICIAL MEMBER**

Sd/-

**[B.P. JAIN]
ACCOUNTANT MEMBER**

Dated: 26th FEBRUARY, 2018

VL/

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asst. Registrar,